

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 7, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2006AP24
STATE OF WISCONSIN**

Cir. Ct. No. 2003CV3318

**IN COURT OF APPEALS
DISTRICT I**

FORMULA FOUR, INC.,

PLAINTIFF-RESPONDENT,

V.

FIDELIS OMEGBU,

**DEFENDANT-THIRD-PARTY
PLAINTIFF-APPELLANT,**

V.

**STATE FARM INSURANCE COMPANY,
STATE FARM FIRE AND CASUALTY COMPANY,
ZURICH INSURANCE COMPANY,
FORMULA FOUR, INC.,
ASSURANCE COMPANY OF AMERICA
AND RICHARD BRUSS,**

**THIRD-PARTY DEFENDANTS-
RESPONDENTS.**

APPEAL from orders of the circuit court for Milwaukee County:
JOHN A. FRANKE, Judge. *Affirmed and cause remanded with directions.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 CURLEY, J. Fidelis Omegbu is appealing the dismissal of his third-party action in what started as an eviction suit originally commenced by Formula Four, Inc., the owner of a commercial office building that rented space to Omegbu. Omegbu's third-party amended complaint at the time of dismissal alleged various causes of action against Richard H. Bruss, the owner of Formula Four, Formula Four, Inc., State Farm Fire & Casualty Company (incorrectly designated as State Farm Insurance Company), and Assurance Company of America (incorrectly designated as Zurich Insurance Company).¹ Omegbu claimed various causes of action against the parties. All of the third-party defendants' suits were dismissed. Although Omegbu argues a great many issues, distilled to their essence he contends that the trial court should not have dismissed his third-party suit because a complete transcript of his deposition testimony, including statements that he believes contradict the contentions of the third-party defendants, was not admitted into evidence and only excerpts of it were presented to the court, a practice that he argues is illegal.

¶2 Because the issue of the admissibility of the deposition testimony was never raised before the trial court, we decline to address it here. It is the often repeated rule in this State that issues not raised or considered in the trial court will

¹ Other parties to the third-party action included Pastor Harold Turner, Trinity Missionary Baptist Church, HATS, Inc., and Continental Casualty Company. These parties were dismissed from the suit earlier. The claims of Formula Four against Omegbu were previously resolved.

not be considered for the first time on appeal. *Wirth v. Ehly*, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980). Consequently, we affirm.

I. BACKGROUND.

¶3 In early February 2003, Formula Four filed a small claims eviction action against Omegbu for a commercial office rented to Omegbu and another.² Eventually, the matter was transferred to the large claims court because of Omegbu’s “supplemental answer and counterclaim” consisting of seventeen pages, in which Omegbu sought money damages from Formula Four for a variety of claims. Following the transfer of the case, Omegbu filed several discovery requests.

¶4 Omegbu then filed an amended counterclaim, in which he added Formula Four’s insurance company, Pastor Harold Turner, Trinity Missionary Baptist Church and State Farm Insurance Company. Apparently Pastor Turner and the church were added due to Omegbu’s allegations that he contracted with Turner to build a new church for Trinity and, according to Omegbu, Turner suggested that Omegbu relocate closer to Turner’s office, resulting in Omegbu leasing office space across the hall from an office that Turner leased. Additionally, Omegbu believed his contract with Trinity made him an additional

² The eviction action was successful and a writ of restitution was granted, as well as a money judgment and costs. On the day the eviction was granted, Omegbu was not in court (he was in jail on a bench warrant), but he did file an answer. Omegbu sought to reopen the judgment; however, the parties reached a stipulation. Shortly thereafter, Formula Four came back to the court requesting that the previous judgment be reinstated because Omegbu did not vacate the premises as provided in the stipulation. The trial court granted the request and the writ of restitution was issued, resulting in the removal of Omegbu’s property from the office. Omegbu’s property was then placed in storage.

insured under both Trinity's insurance policy and under Turner's insurance policy.³

¶5 Turner, as the church representative, was sued because of his initial suggestion that Omegbu relocate and because he later elected to proceed with the building of a new church with another company. All of the new parties filed an answer.⁴ Omegbu then successfully filed several motions seeking to compel discovery and requesting sanctions.

¶6 Later, Omegbu filed a document entitled "Third Party Plaintiff's Amended Complaint and Joinder of Parties, in Supplements to Defendant's Counterclaim," in which he added Richard H. Bruss, the owner of Formula Four, HATS, Inc., and Continental Casualty Company as third-party defendants.

³ Omegbu's co-tenant, Teri Campbell, was a State Farm insurance agent. Campbell was not named in the eviction suit with Omegbu, as she was sued in a separate eviction action. Due to Campbell's employment, Omegbu later took the position that State Farm was a guarantor of the rent. When it was later determined that Campbell was an independent contractor and State Farm had nothing to do with the terms of Campbell's lease and had never guaranteed Campbell's lease payments, Omegbu contended that State Farm had a duty to inform him that Campbell would be closing down her office. He also argued that Formula Four should have told him that Campbell was behind in her rent when he entered into the lease with her. Omegbu also believed that Formula Four had unlawfully seized his property located in the office, including his telephone, and, according to Omegbu's way of thinking, this resulted in Formula Four's unlawful interference with his contract with Turner and Trinity. It was later revealed that Campbell had sold the office equipment in question to Omegbu and Omegbu had been making periodic payments. When Omegbu stopped making payments, Campbell took back the property and sold it to Formula Four in order to obtain a reduction in the amount of money she owed in back rent.

⁴ The record indicates that Zurich Insurance Company filed an answer. Later, it was determined that the correct name of the insurer for Formula Four was Assurance Company of America, and Assurance was substituted in for Zurich. The record also names State Farm Insurance Company as a party; however, the proper name of this party is State Farm Fire & Casualty Company, which was at times also referred to as a party in the record. The trial court, when signing the dismissal order, was apparently unaware of these substitutions and crossed out Assurance's name, and incorrectly used the name State Farm Insurance Company. This error should be rectified on remand.

However, HATS, Inc. and Continental were subsequently dismissed. Among Omegbu's new contentions was his allegation that Bruss had obtained the lease agreement by fraud.⁵ Approximately one month later, Omegbu brought yet another motion seeking to compel discovery and requesting sanctions.

¶7 In response, Formula Four filed a motion seeking to strike many of the paragraphs in Omegbu's amended complaint. Eventually, on November 3, 2004, the trial court entered an order that dismissed Turner and Trinity from the suit and dismissed certain claims against State Farm. Omegbu then filed another amended complaint, this time naming only Formula Four, Bruss, Zurich, and State Farm. The parties answered the new complaint.

¶8 Several months later, Omegbu filed a motion claiming that Formula Four's original action in suing him was frivolous, and brought a motion for summary judgment.

¶9 State Farm filed a motion seeking a protective order, which was granted.⁶ Meanwhile, Omegbu's deposition, which had been calendared twice, was finally taken, as was the deposition of Richard Bruss. The trial court denied

⁵ HATS, Inc., an insurance agency owned by Turner, was accused of being involved in the fraud. (There were various other legal theories raised by Omegbu concerning the liabilities of the parties that are not set forth in this opinion.) Continental was named because Omegbu believed it provided insurance coverage for Turner. Later, it was learned that Continental never provided insurance to Turner in his capacity as an insurance agent. A motion seeking dismissal of Continental is in the file. Omegbu alleged Continental insured HATS, Inc. and Turner. No actual dismissal order could be found in the record. It would appear that such a motion may have been granted because Continental's attorney was not present for subsequent proceedings. Assurance Company of America provided an insurance policy for Formula Four.

⁶ As noted, Omegbu contended that State Farm had been a guarantor on the lease with the co-lessee, Teri Campbell, who was an insurance agent for State Farm. Omegbu was seeking State Farm's proprietary information.

Omegbu's motions seeking discovery and frivolous costs, as well as his motion for summary judgment. On November 1, 2005, the trial court granted the motions for summary judgment filed on behalf of State Farm, Bruss, Formula Four and Assurance, and on February 1, 2006, entered judgment accordingly. This appeal follows.

II. ANALYSIS.

¶10 Despite several lengthy amended third-party complaints, discovery motions and orders and Omegbu's rambling briefs, along with the remainder of the record that occupies a large box, it appears Omegbu seeks to overturn the trial court's decision granting summary judgment to the remaining third-party defendants based on one fact only—that Omegbu's deposition testimony was not admitted into evidence in its entirety, and instead, the opposing parties chose to submit only excerpts of Omegbu's deposition testimony. There are two problems with Omegbu's argument. One, Omegbu failed to object to the use of his deposition testimony in this manner, and two, he has failed to include the transcript of this proceeding. As noted, issues not raised or considered in the trial court will not be considered for the first time on appeal. *Wirth*, 93 Wis. 2d at 443-44. Thus, we decline to address Omegbu's first argument. Second, were we to address it, we would have to assume that the missing transcript supports the trial court's decision. See *T.W.S., Inc. v. Nelson*, 150 Wis. 2d 251, 254-55, 440 N.W.2d 833 (Ct. App. 1989). This court must "assume, in the absence of a transcript, that every fact essential to sustain the trial court's decision is supported by the record." *Id.* at 255; *Haack v. Haack*, 149 Wis. 2d 243, 247, 440 N.W.2d 794 (Ct. App. 1989). It is the appellant's duty to see that the record is sufficient to review the issues raised on appeal. *Lee v. Labor & Indus. Review Comm'n*, 202

Wis. 2d 558, 560 n.1, 550 N.W.2d 449 (Ct. App. 1996). For the reasons stated, we affirm.

By the Court.—Orders affirmed and cause remanded with directions.

Not recommended for publication in the official reports.

